(See 160 US 643)

160-643

EXTRACTS FROM TRANSCRIPTS OF RECORDS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY, APPELLANT,

vs.

MARY H. PIKE.

No. 603.

CHARLES A. GREGORY, APPELLANT,

vs.

THOMAS H. TALBOT.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

RECORDS FILED MAY 3, 1895.

(15,887 & 15,888.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1895.

EXTRACTS FROM RECORD IN GREGORY *v.* PIKE, NO. 602, OCTOBER TERM, 1895.

(Record, page 3.)

Bill of Complaint.

(Filed in supreme judicial court of Massachusetts Dec. 16, 1884.)

Charles A. Gregory, of the city of Chicago and State of Illinois and a citizen of said State of Illinois, brings this his bill of complaint against Francis A. Pike, of Calais, in the State of Maine, and citizen of said State of Maine, and William C. N. Swift, of the city of New Bedford, in the State of Massachusetts, and a citizen of said State of Massachusetts.

And thereupon the plaintiff complains and says that on or before the thirtieth day of March, 1883, he was the owner of eighty thousand shares of the capital stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois, a corporation duly established under the laws of the said State of Illinois, and, being such owner, he delivered the same to one George W. Butterfield, in the city of Boston, Massachusetts, and took of said Butterfield a receipt or declaration of trust in the words and figures following, to wit:

BOSTON, *March* 30, 1883.

Received of Charles A. Gregory 80,000 shares of the stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois. I take the same to have it registered upon the books of the company in the name of George W. Butterfield, of San Francisco, as trustee, and I will deliver the same to said Gregory on demand and in the meantime hold the same in trust for him as his property.

G. W. BUTTERFIELD.

That said Butterfield procured the said shares to be registered in his own name on the books of said corporation, and thereafter, on or about the fourth day of April, 1883, negotiated the sale of said shares to the defendant Swift for the sum of $46,400, and in payment for said shares took or received from said Swift five thousand dollars in cash and his two notes of hand dated April 4, 1883, each for $20,334.60, payable to the order of said George W. Butterfield, one payable in two years and one in three years after said date, with interest at the rate of six per cent. per annum, and the plaintiff says that the said Butterfield indorsed the same and then delivered to him the said two notes of said Swift for $20,334.60 at the city of New York on the ninth day of April, 1883, when the plaintiff was to embark for Europe on the next day thereafter, to be absent for some time, and did so embark and was in fact absent from this country till the January following; that he, the plaintiff, then and there, on the 9th day of April aforesaid, returned the said notes to the said Butterfield on the execution and delivery by said

Butterfield to him of an agreement or declaration of trust in the words and figures following, to wit:

NEW YORK, *April 9th*, 1883.

I hold in my hand notes of W. C. N. Swift, dated New Bedford, Mass., 1883, 4 m., 4th, one due two years after date for $20,334 60, one due three years after date for $20,334.60, payable to order of George W. Butterfield, with interest at six per cent. per annum. These two notes belong to Chas. A. Gregory and the proceeds of them, and I agree to deliver the same to him upon request or the full amount of money expressed therein, and I also owe an account and payment to said Gregory for $730.80, being his *pro rata* of the two other notes of similar description held by me belonging to J. C. Kemp. Gregory is entitled to one-half of this $730.80 in two years and one-half in three years, with interest as above.

G. W. BUTTERFIELD.

And the plaintiff says that said Butterfield became thereby the bailee, depositary, or holder of said two notes in trust for the plaintiff and subject to the plaintiff's orders concerning the same, and had no power or authority from the plaintiff to dispose of said notes in any way, unless, perhaps, to receive payment thereof from said Swift, to whom the said Butterfield had promised and agreed that said notes should not be put on the market for sale or offered for discount; and the plaintiff further shows that the said Butterfield, soon after the receipt of the said two notes from said Gregory as aforesaid (to wit, on or about the tenth day of April, 1883), passed over the said notes to one Charles F. Jones, his friend and associate, who was then cognizant of the fact that the said notes belonged to the plaintiff and were held by the said Butterfield as trustee for the plaintiff as aforesaid and not otherwise, and the said Jones took the said notes to the said Swift, the maker, and gave up or surrendered the same to him, taking in place of one of said notes an instrument, dated April 20, 1883, signed by said Swift, by which he promised to pay to said Jones a like sum of $20,334.60 in three years from date, with interest, but not negotiable; and in place of the other note of $20,334.60 the said Jones took in part another instrument, dated April 20, 1883, signed by said Swift, by which he promised to pay to said Jones the sum of $15,000 or thereabouts (the precise sum being unknown to the plaintiff at this time, but is believed to be about $15,000), payable in two years from its date, with interest, but not negotiable.

And the plaintiff, further complaining, shows that these two contracts or instruments in writing signed by said Swift, sometimes called notes, for the payment to said Jones only of said sums of $20,334.60 and of $15,000 or thereabouts, were by the said Jones passed over to the said Butterfield, to be by him held in the place of and instead of the two notes of $20,324 60 each intrusted to him by the plaintiff as aforesaid; and the plaintiff says that the said two new notes or contracts drawn payable only to the said Jones and coming into the hands of the said Butterfield in renewal

of or substitution for the two notes first given to said Butterfield by said Swift were affected by the same trust in favor of the plaintiff which was attached to the said two notes last mentioned when placed in the hands of said Butterfield as trustee for the plaintiff, as above set forth.

And the plaintiff says that said Butterfield had no right to deal with the said new instruments as his own and took no title whatever thereto from or under the said Jones, as payee or assignor of the same to him, but stood in the same relation to the said Gregory with regard to the said two notes or instruments which he previously held respecting the two original notes of said Swift, as above mentioned, payable to the said Butterfield and exchanged for the two new notes or instruments made payable to said Jones.

And the plaintiff, further complaining, shows that the said Butterfield, while thus holding the two said last-named instruments in special trust for the plaintiff, as aforesaid, viz., on the 31st day of July, 1883, entered into a certain contract in writing with the defendant Pike, a copy of which is annexed hereto, marked "Exhibit A," and is a part hereof, by which contract the said Butterfield undertook and agreed to purchase of the said Pike certain mining property situated in California, and to pay therefor to said Pike the sum of $242,666, payable as follows, viz:

The sum of $25,000 at the time of the execution of the contract and the residue, to wit, $217,266, on or before the first day of January, 1884, and the said Pike was not to give to said Butterfield any title to the mining property so contracted for by him until the purchase-money thereof should have been paid in full, and the said Butterfield had no means and was unable to meet the cash payment of $25,000, and was known by said Pike to be unable to make the payment at the said time; and thereupon the said Butterfield, acting in fraud of the plaintiff and in violation of the agreement or trust assumed by him in regard to the notes of said Swift, originally confided to him by the plaintiff as aforesaid and subsequently exchanged for the new non-negotiable notes payable to said Jones as aforesaid, delivered or passed over to said Pike the said two instruments of April 20, 1883, by way of pledge as collateral security for the payment of the said sum of $25,000, making part of the amount to be paid by him to the said Pike as purchase-money for the said mining property of the said Pike.

And the plaintiff is informed and believes, and therefore says, that the said two instruments signed by said Swift under date of April 20, 1883, and payable to the said Jones, the name of said Jones having been previously placed by him upon the back of said instruments, were delivered to and lodged with said Pike by said Butterfield as and for security for the $25,000 payment as set forth in the memorandum entered at the back of said contract "A" and hereby made a part of this bill by reference.

And the plaintiff, further complaining, shows that just previously to the execution of this contract of July 31, 1883, the said Butterterfield represented to the plaintiff that he still remained in possession of the two notes first given by said Swift of $20,334.60 each,

and that the plaintiff did not learn of the substitution by said Butterfield of said instruments for said two original notes nor of the attempt of the said Butterfield to pledge said new instruments to said Pike as security for the payment of his own engagement for $25,000 until long afterwards, to wit, until some time in December, 1883, and thereupon the plaintiff made demand both upon the said Butterfield and the said Pike for the surrender and delivery to himself of the said two notes or instruments of April 20, 1883, notifying the said Pike at the same time of his ownership of the said notes or instruments before the same were passed over to him by said Butterfield by way of pledge as aforesaid; and the plaintiff further shows that the contract entered into with said Pike on the 31st day of July, 1883, for the purchase of said mining property was never carried into execution or performed by either the said Butterfield or the said Pike, but was abandoned by them, the said Pike retaining the said property or his title thereto as before and still continuing to hold the same, as the plaintiff is informed and believes, and being no longer bound by his said contract of July 31, 1883, nor holding the said Butterfield as bound thereby, but electing to treat said contract as mutually abandoned by both parties, and the plaintiff is informed and believes, and therefore avers, that said Pike is about to enter into negotiations for the sale of said mining property to other persons at a rate or price beyond that specified in the contract of sale to Butterfield, dated July 31, 1883, above mentioned, and the plaintiff shows that it would be contrary to equity to retain the two notes so pledged to him as security for part of the price to be paid by said Butterfield for said mining property and at the same time to sell the said mining property to others for its full value.

And the plaintiff further shows that the said Pike having thus come into possession of the said notes or instruments, being at the time the property of the plaintiff, through the fraud of the said Butterfield or his breach of trust, and to enable him, said Butterfield, to obtain from said Pike the contract of July 31, as above mentioned, the said Pike now holds no title to the said notes or instruments by reason of the delivery or pledge thereof to him made by said Butterfield, but holds them as trustee for the plaintiff as fully as the said Butterfield himself was such trustee, and so the said Pike is in equity bound to surrender the said notes to the plaintiff as he has been heretofore requested to do; and the plaintiff, further complaining, shows that the said Swift has been notified by the plaintiff of his ownership of the said notes or instruments and of the fraud practised on the plaintiff by delivering or pledging the same to said Pike as aforesaid and has been cautioned by the plaintiff to pay the same to no one but the plaintiff, and that the plaintiff will indemnify said Swift against the claims of any one else upon or against him, the said Swift, by reason of the said notes or instruments.

And the plaintiff further shows that the said instruments are not promissory notes in the legal sense of that term nor negotiable or transferable as such by indorsement, but are simple contracts for the payment of money to the said Jones and him only, and that the fraudulent pledge or deposit of said notes or instruments with

the said Pike as aforesaid has not conferred on said Pike any right of action whatever against the said Swift upon said instruments, and that said Swift cannot lawfully discharge said instruments or contracts by dealing in relation thereto with the said Pike or any one excepting this plaintiff.

And the plaintiff further shows that the said Pike, unless restrained by the order or decree of this court, may undertake to sell or transfer the said two notes or instruments to some person who is not cognizant of the facts hereinabove set forth in regard to the plaintiff's ownership thereof, and has threatened to do so, or to expose the same to sale by auction, or the said Pike might place them beyond the reach of the plaintiff or surrender them to the said Swift or to the said Butterfield or the said Jones, or execute a release or discharge thereof in some way, under the pretence of lawful authority to do so; and the said Swift, unless restrained by this honorable court, might also procure the surrender of the said notes or contracts by the said Pike to him in disregard of the right of the plaintiff in and to the same; and this plaintiff is apprehensive lest the said Pike may deal with said notes in some of the ways above mentioned unless restrained by this honorable court.

To the end, therefore, that the said Pike may be compelled by decree of this honorable court to surrender the said two notes or contracts of the said Swift and deliver them over to the plaintiff, and may be restrained from dealing with any other person than the plaintiff as the lawful owner of the said notes or contracts, and from making payment of the same or of any part thereof except to the plaintiff, and that the plaintiff may have such other and further relief in the premises as he may be entitled to, the plaintiff prays that the usual process of subpœna may issue, directed to the said Francis A. Pike and the said William C. N. Swift, requiring them respectively to appear in this honorable court and make answer to this bill of complaint, the plaintiff hereby waiving any answer upon oath by either of said defendants.

CHARLES A. GREGORY.

F. A. BROOKS,
Solicitor for Plaintiff.

* * * * * * *

(Record, p. 13.)

Answer of Frederic A. Pike.

(Filed in supreme judicial court of Massachusetts Feb. 11, 1885.)

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the complainant's said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised — or are material or necessary for him to make answer unto, this defendant, answering, saith as follows, to wit:

First. As to the dealings, transactions, and communications which the complainant alleges to have taken place or passed between him and Butterfield and Jones mentioned in his bill, or either of them, this defendant has no knowledge, nor did he at any time heretofore have any such knowledge.

Second. It is true that this defendant did on the thirty-first day of July, 1883, enter into the contract with said Butterfield a copy of which is annexed to the plaintiff's bill of complaint, thereby binding himself to give the title as agreed in said contract, which was the only contract or agreement made with said Butterfield touching or concerning said title.

Third. This defendant did not know that said Butterfield was unable to make the payment of $25,000, as alleged by the complainant.

Fourth. Said Butterfield did not deliver or pass over to this defendant the two instruments of April 20, 1883, mentioned in the plaintiff's bill in the manner therein alleged nor in any other manner. On the contrary, said instruments or notes were delivered to the defendant by said Charles F. Jones in the presence of said Butterfield and for the purpose specified in the codicil of the agreement.

Fifth. Whether the complainant did not know of the substitution by said Butterfield of said instruments of April 20, 1883, for said two original notes or of the attempt of said Butterfield to pledge said new instruments to this defendant as security of the payment of his own engagement for $25,000 until long afterwards, as in his complaint he has alleged, this defendant has no knowledge; but it is true that some time in December, 1883, the plaintiff did demand of this defendant the surrender or delivery to himself of the said two notes or instruments of April 20, 1883. At the same time the plaintiff gave to the defendant a written notification, dated Dec. 11, 1883, which is hereunto annexed, marked "A," and he gave the defendant no other or further notification touching this matter.

Sixth. The contract entered into by this defendant on the thirty-first of July, 1883, as stated in the plaintiff's bill, was never abandoned by this defendant and said Butterfield or by either of them, but was performed and carried into execution by this defendant, according to its terms, at an expense to the defendant of two hundred and eighty-two dollars and fifty cents, which he was obliged to pay to the Union Trust Company of New York in order to obtain their consent to hold the deeds in escrow, as provided in the contract.

Seventh. This defendant is not about to enter into negotiations for the sale of the mining property mentioned in said contract of July 31, 1883, to other persons at a rate or price beyond that specified in said contract. On the other hand, negotiations are going on with this defendant for a sale of said mining property, and this defendant is willing to sell the same at a rate or price far below that specified in said contract.

Eighth. On the day of the contract mentioned in plaintiff's bill and by copy annexed thereto, to wit, July 31, 1883, one Charles H. Eaton presented to this defendant an order signed by said Charles

F. Jones, a copy of which is hereto annexed, marked "B," and the defendant accepted the same, as specified in said copy, and this defendant is informed and believes that the C. H. Eaton mentioned in said order did, in consideration of receiving the same, discharge a mortgage which he held on valuable property as security for the same debt, towards the payment of which the order was given.

Ninth. At the time of entering into said contract of July 31, 1883, this defendant had no knowledge or suspicion that the plaintiff had any interest whatever in or claim or lien upon the said instruments of April 20, 1883, transferred to him by said Charles F. Jones. On the contrary, he fully believed that the same were the property of said Jones, and the first intimation to the contrary of such belief received by this defendant was in the notification of the plaintiff of December 11, 1883, hereunto annexed. Said notes or instruments came into the possession of this defendant for a valuable consideration and in good faith on his part, he having no knowledge or notice that the same were subject to any trust or other claim, equitable or legal, in favor of this plaintiff, by reason of which premises this defendant prays that this bill of the plaintiff may be dismissed and that this defendant may have his costs.

FREDERIC A. PIKE,
By his solicitor, THOS. H. TALBOT.

A true copy.
Attest: JOHN NOBLE, *Clerk.*

* * * * * * *

(Record, p. 26.)

Petition for Removal to Circuit Court.

(Filed in supreme judicial court of Massachusetts April 28, 1885.)

To the honorable the justices of the supreme judicial court for the county of Suffolk and Commonwealth of Massachusetts:

Your petitioner, Charles A. Gregory, plaintiff in the above-entited suit, respectfully shows that the matter and amount in dispute in said cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States; that said petitioner at the time of bringing said suit was and still is a citizen of the State of Illinois; that the said Frederick A. Pike, one of the defendants, then was and *and* still is a citizen of the State of Maine; that William C. N. Swift, the other defendant, then was and still is a citizen of the State of Massachusetts; and your petitioner shows that the present April term of said court is the first term at which said cause could be tried; and your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the district of Massachusetts on the fifteenth day of May next, at Boston, in said district, pursuant to the provisions of law contained in the act of Congress approved March 3, 1875; and your petitioner offers herewith his bond, with

good and sufficient surety, for entering in the said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if it shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further in said cause except to make the order of removal required by law and to accept the said bond and to cause the record of this suit in this court to be removed into the said circuit court of the United States at the next term thereof, to be held as aforesaid.

CHARLES A. GREGORY.

F. A. BROOKS,
Solicitor for Plaintiff.

A true copy.
Attest: JOHN NOBLE, *Clerk.*

* * * * * * *

(Record, p. 28.)

Order for Removal to Circuit Court.

(Entered in supreme judicial court of Massachusetts May 5, 1885.)

And now in the above-entitled cause, it appearing to the court that the plaintiff has duly filed in this court his petition, praying for the removal of said cause to the circuit court of the United States for the district of Massachusetts, and also a satisfactory bond, pursuant to the statute of the United States—

It is ordered that this cause be removed to the circuit court of the United States in accordance with the prayer of said petition.

By the court:

JOHN NOBLE, *Clerk.*

May 5, 1885.

A true copy.
Attest: JOHN NOBLE, *Clerk.*

* * * * * * *

(Record, p. 246.)

Circuit Court of the United States, District of Massachusetts.

CHARLES A. GREGORY
v.
FREDERIC A. PIKE *et al.* } In Equity. No. 2170.

Final Decree, March 8, 1894.

COLT, *J.:*

This cause came on to be further heard at this October term, 1893, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

1. That from the fund in the registry of the court in this cause there be paid to the clerk of this court, as required by law in such case, one per cent. upon the whole of said fund.

2. That there be paid from said fund to the administrator of the defendant Swift, deceased, costs, to be duly taxed, in favor of said defendant.

3. That for special services in connection with said fund, as set forth in his petition, there be paid to John G. Stetson the sum of eight hundred dollars.

4. That there be paid to the defendant John C. Kemp Van Ee one-half of the proceeds of the fifteen-thousand-dollar note, with the accumulations thereon.

5. That there be paid to Mary H. Pike, executrix of the original defendant, Frederic A. Pike, since deceased, the sum of twenty-five thousand dollars, with interest thereon from Jan. 1, 1884, if the fund remaining in the registry of the court shall be sufficient for the payment, and if not sufficient, the balance of said fund.

6. That the cross-bill of the defendant George W. Butterfield be dismissed.

7. That after the payments hereinbefore decreed to be made to said clerk, the administrator of Swift, and Stetson and the amounts decreed to be paid to Kemp and Pike, as hereinbefore provided, the remainder of the fund, if any, be paid to the plaintiff, Charles A. Gregory.

By the court:

BENJ. H. BRADLEE,
Deputy Clerk.

* * * * * * *

(Record, p. 517.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

CHARLES A. GREGORY, Appellant,
v.
MARY H. PIKE, Appellee. } No. 98.

Before Putnam, Webb, and Carpenter, JJ.

Final Decree, January 31, 1895.

This cause came on to be heard October 25 and 26, 1894, on the transcript of the record from the circuit court of the United States for the district of Massachusetts with—

CHARLES A. GREGORY, Appellant,
v.
JOHN C. KEMP VAN EE, Appellee, } No. 99.

THOMAS H. TALBOT, Appellant,
v.
MARY H. PIKE, Ex'x, *et al.*, Appellees, } No. 100.

and

GEORGE W. BUTTERFIELD, Appellant,
v.
CHARLES A. GREGORY *et al.*, Appellees, } No. 101.

on separate appeals, and was argued by counsel.

On consideration whereof it is now, to wit, January 31, 1895, ordered that Thomas H. Talbot, attorney for Mary H. Pike, executrix, recover the amount for services asked for in his intervening petition; that the amount so recovered rank as explained in the opinion filed this day in this case; that the cross-bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*; that Mary H. Pike, executrix, recover her costs against Gregory in this court and in the circuit court; that Gregory recover his several costs against Butterfield and Kemp Van Ee on their cross-bills, both in this court and in the circuit court; that no other costs be recovered in either court, except as expressly stated in the decree entered in the circuit court March eighth, eighteen hundred and ninety-four; that Mary H. Pike, executrix, and Kemp Van Ee be allowed respectively accumulations and interest to the time of the entry of the final decree on the rules applied to him or her in said decree entered said March eighth, and that the case be remanded to the circuit court with directions to enter a final decree conforming to this order, so far as it goes, and in all other respects to said decree entered March eighth, eighteen hundred and ninety-four.

By the court:

JOHN G. STETSON, *Clerk.*

* * * * * * *

(Record, p. 556.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

CHARLES A. GREGORY, Appellant,
v.
MARY H. PIKE, Appellee. } No. 98.

Appeal.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled cause on the 31st day of January, 1895, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this

appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order or decree was made and of all proceedings had in said cause since the entry of said decree, duly authenticated, may be sent to the said Supreme Court of the United States.

F. A. BROOKS,
Solicitor for the Appellant.

April 2, 1895.

The foregoing appeal is allowed.

WILLIAM L. PUTNAM,
U. S. Circuit Judge and Judge of the United States Circuit Court of Appeals for the First Circuit and Presiding in the Above-named Cause.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

* * * * * * *

(Record, p. 558.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

CHARLES A. GREGORY, Appellant from Decree of the Circuit Court,
v.
MARY H. PIKE, Appellee. } No. 98.

Assignment of Errors in the Circuit Court of Appeals.

And now, on this 28th day of March, A. D. 1895, comes Charles A. Gregory, appellant above named, by F. A. Brooks, his solicitor, and says that the decree of this court of appeals entered in said cause on the 31st day of January last is erroneous and against the rights of said appellant, Gregory, for the reasons following, to wit:

First. Because the said Mary H. Pike, in whose favor the decree of the circuit court of March 8, 1894, and affirmed by said court of appeals by its decree of January 31, 1895, was made, was not a party to the original cause of Charles A. Gregory *v.* Frederic A. Pike and William C. N. Swift, the said Gregory having been the only plaintiff and the said Frederic A. Pike and William C. N. Swift having been the only defendants to said original cause and both of them having deceased prior to the time of the entry of the decree of the circuit court in said cause, from which decree the said Gregory duly appealed to this circuit court of appeals.

Second. Because the said Mary H. Pike was not entitled to litigate with said Gregory in said original cause, and never presented any claims to the circuit court as a litigant with Gregory in said original cause or any petition for leave to litigate with Gregory in said original cause, and never set up any claim in her own name and behalf as a party to said original cause or as one entitled to litigate therein for any purpose, and never produced or offered to

produce any evidence in support of any right or relief claimed by her as a party litigant in said original cause.

Third. Because the cause of action in said original suit was between the said Gregory and said Frederic A. Pike and them alone, and said suit was brought in the State court of Massachusetts and thence removed to the United States circuit court (the said Gregory being a citizen of Illinois), and the said Pike a citizen of Maine, so that they could not litigate with each other in the courts of Massachusetts, except by their mutual consent to do so, and to be bound thereby, and as the said Pike deceased before said suit was heard or decided, and as it related to the right of possession of certain non-negotiable notes held by said Pike and claimed by said Gregory as belonging to him, the cause of action against the said Pike did not survive to the said Gregory in the courts of Massachusetts, and if the legal representatives of said Pike, living in Maine at the time, had any cause of action against the said Gregory, that cause of action could only be prosecuted in the State of Illinois, where the said Gregory resided, so that the said original suit of Gregory against Pike became abated by reason of the death of the defendant Pike, and there is no evidence in the case to show that any steps have ever since been taken to revive the same if it were capable of revivor.

Fourth. Because the plaintiff having in and by the second paragraph of his assignment of errors excepted to the ruling of the circuit court in recognizing the right of the said Mary H. Pike to litigate with him in said original cause as the legal representative of Frederic A. Pike, deceased, and as such alleged legal representative of said Pike, deceased, to be paid the sum of $25,000 and ten years of interest thereon, and the circuit court of appeals, having failed to pass upon this assignment of error and having been called upon to do so by said Gregory in his petition for a rehearing, denied said petition for a rehearing, and in its opinion accompanying said denial (filed Mar. 21, 1895) referred to said assignment of error in these words:

"In the petition for rehearing * * * it is insisted that the court has overlooked the point made by Gregory touching the alleged abatement of his original bill. This was rendered unimportant by what was held in our opinion with reference to his bill filed January 10, 1887."

Fifth. Because there is nothing in the bill of complaint filed in the circuit court by Gregory, as plaintiff, against Stetson, Swift, and Talbot, as defendants, or in the amendment of said bill made April 22, 1889, for the purpose of proceeding with said new bill of complaint under the provisions of section 738 of the Revised Statutes, which warranted the circuit court of appeals in holding as it did that the point made by Gregory that his original bill become abated by the death of Pike had been rendered immaterial by reason of the bill filed by him in the circuit court January 10, 1887, as aforesaid.

Sixth. Because both the circuit court and the circuit court of appeals ruled and held that Mary H. Pike was made a defendant

to Gregory's second bill of complaint of January 10, 1887, by reason of an amendment thereof made and filed April 22, 1887, and of certain subsequent proceedings had under said amended bill relating to the said Mary H. Pike, and that by reason of the filing by said Gregory of said bill of January 10, 1887, and of the amendment thereof, the said Mary H. Pike not only became a party to said original suit and entitled to litigate therein with said Gregory, but also became entitled to litigate with him under said second bill of complaint and to have affirmative relief as a party to the same, whereas this appellant contends that if said Mary H. Pike became entitled to litigate with said Gregory under said bill of complaint, yet she only became entitled so to litigate adversely to the said Gregory and gained no right to affirmative relief of any kind, so that the decree of both said courts affording her affirmative relief was wholly erroneous and contrary to the rules of legal procedure.

And because if the said Mary H. Pike was duly made a defendant to Gregory's bill of complaint of January 10th, 1887 (as is not admitted), yet the said bill of complaint was finally dismissed as to her on the 24th day of January, 1891, by an order of the circuit court to that effect passed on that day.

Seventh. Because the circuit court found and held and ruled that the interest of Frederic A. Pike, defendant to Gregory's original bill of complaint, who had died in December, 1886, was thereafter represented by his executrix, Mary H. Pike, in the absence of any evidence that she had been appointed as such executrix either under the laws of Maine, where the said Pike resided at the time of his death, or under the laws of Massachusetts, where the suit in question had been pending during the lifetime of said Pike, and the circuit court of appeals adopted and affirmed these rulings of said circuit court, and both said courts committed the same error in this respect.

Eighth. Because if the said Mary H. Pike had been appointed executrix of the will of Frederic A. Pike under the laws of Maine she could not lawfully prosecute a claim to property belonging to her testator situate or found within the State or district of Massachusetts, without first taking out administration papers under the laws of Massachusetts, as was never done, and for this reason the decrees of both said courts in favor of Mary H. Pike were and are erroneous.

Ninth. Because it is not set forth in any allegations or pleadings and is not shown by any evidence produced or offered by the said Gregory or the said Mary H. Pike or any other person that any sums of money were ever paid into the circuit court when sitting in equity in the original cause of Charles A. Gregory against Frederic A. Pike, and it is not claimed or pretended that as a matter of fact any sums of money were paid into court by William C. N. Swift in said original cause or in any other cause during the lifetime of the said Frederic A. Pike; and the finding by the court of appeals that Mary H. Pike, as executrix of the defendant Frederic A. Pike in the original suit of Gregory against Pike, should be paid the sum of

$25,000, with interest thereon since January 1, 1884, or for a period of two years preceding the decease of said Pike, was erroneous.

Tenth. Because there is nothing in the evidence in the original cause of Gregory against Pike tending to show that as between the said Gregory and the said Pike, deceased, there was any question of indebtedness of any kind or of interest growing out of indebtedness of any kind; and both said courts have erred, as we say, in making any decree for interest in favor of Mary H. Pike to any amount whatever.

Eleventh. Because no money having been paid into the circuit court by Swift as defendant to the original equity cause of Gregory *v.* Pike *et al.* prior to the 9th day of July, 1887, the circuit court, on that day, passed an order entitled in said equity cause in these words:

"Upon the petition of Mary H. Pike, executrix, filed in this cause, and with the consent of Swift and Butterfield, defendants in this cause, and of Thomas H. Talbot, attorney for Charles F. Jones in the suit at law of Jones *v.* Swift, No. 2435 on the law docket of this court, it is ordered—

(1.) That defendant Stetson file the note of $15,000, referred to in the said petition, in the said action at law No. 2435, of Jones *v.* Swift.

(2.) That upon the entry of judgment in the said action at law said Swift be directed to pay into the registry of this court the amount of said judgment (but without commissions, by consent of the parties named herein), and that said amount be held subject to the rights of the parties claiming said note and to abide the decision of the court in this cause.

(3.) That upon the payment by said Swift into the registry of this court of the amount of said judgment, an order of satisfaction of said judgment be entered of record."

And this order of court having been assigned as one of the errors of the circuit court in its decree or decision of said equity suit, the circuit court of appeals failed to take any notice of said assignment of error or to refer or allude to it in any way in its opinion of January 31, 1895, and the plaintiff Gregory having petitioned for a rehearing of said appeal and having in said petition used the language following:

"No allusion whatever is made in the opinion of the court to this assignment. Whether your honor's failure to notice this alleged error was from oversight or was intentional is of no consequence. In either point of view your petitioner has been deprived of the benefit of this assignment of error in the court below in a matter, as your petitioner is advised and believes, of vital importance to him, and he thinks he is entitled to a rehearing upon this part of the case, if upon no other, and he claims this as a right."

The circuit court of appeals denied said petition, and in its denial said:

"The petition also insists that this court overlooked the order passed July 9th, 1887, touching the $15,000 note. The petitioner is mistaken, as the opinion of the court covers both notes."

Twelfth. Because it not appearing that said order of July 9, 1887, was lawful or valid, or that Swift, as defendant to the original equity cause of Gregory and Pike, ever paid any money into court in said equity cause, under said order or otherwise, the circuit court in its opinion and decree ruled and held that the amount of said $15,000 note had not been paid into the registry of the court in said equity cause, and had thereby become a fund subject to the disposal of the circuit court in said equity cause, and awarded the said fund to Mary H. Pike and one John C. Kemp Van Ee, and the circuit court of appeals erroneously affirmed, ratified, and approved this finding or award of the said circuit court in that respect.

Thirteenth. Because if any sums were paid into court by W. C. N. Swift on account of the two notes, one of $15,000 and one of $20,334.60, made by him and pledged to Pike, such sums were paid by him as defendant to two certain actions at law brought thereon by or in the name of Charles F. Jones, the payee of said notes, after judgment had been entered against him in said actions at law and without any legal process issued against him in said actions at law, and for the purpose of satisfying said judgment and for no other purpose, and, said sums being appropriated by him to the satisfaction of said judgments, it was not in the lawful power or jurisdiction of the circuit court to change such appropriation or direct such sums to be paid to Mary H. Pike as provided in and by the decree of March 8, 1894, should be done.

Fourteenth. Because if it were true that the circuit court was in possession of a fund to be distributed by it in the lawful exercise of its jurisdiction in the original equity cause of Gregory *v.* Frederic A. Pike, and if it were true that Mary H. Pike was duly appointed to be the legal representative of the said Frederic A. Pike, deceased, under the laws of Maine, and by virtue of such appointment in Maine was entitled to represent the estate of said Frederic A. Pike in the courts of Massachusetts, yet the said Mary H. Pike did not make or present to the said circuit court any application in writing for said fund or any part of it, and the said Gregory had no opportunity to be heard by the said court respecting the right of said Mary H. Pike to said fund or to contest the same, and the decree awarding the said fund to her was without due process of law and consequently void.

Fifteenth. Because, there being no fund in court in the original cause of Charles A. Gregory against Frederic A. Pike *et al.*, the circuit court and the circuit court of appeals have found not only that there was such a fund in court, but that Mary H. Pike and John C. Kemp Van Ee, neither of whom were parties to said original cause, were entitled to said fund, and are entitled to be paid sums in excess of the entire amount of the supposed fund in court, thereby exhausting the said supposed fund without making any provision whatever for the said Gregory, for whose sole benefit the original cause of Gregory *v.* Pike was brought, and prosecuted by him so long as it was in his power to prosecute the same, against the said Frederic A. Pike.

Sixteenth. And this appellant assigns as erroneous so much of the

decree of the circuit court of appeals of January 31st, 1895, as relates to Thomas H. Talbot, because the said Talbot was never a party to the original cause of Gregory against Pike and Swift, and was not a party to the bill of complaint of Gregory against Stetson, Swift, and Talbot at any time after August 15th, 1887, when said bill was dismissed as to him, and because the said Talbot did *did* not present any petition to the circuit court for the allowance to him of fees as counsel in the old cause of Gregory and Pike until after the entry of the final decree of March 8th, 1894, in said original cause, and the fees claimed by him in his said petition were for services rendered by him in the prosecution of two certain actions at law as the attorney of Frederic A. Pike, who died on the 2nd day of December, 1886, before any judgments were recovered or collections made in said actions at law, and the employment of said Talbot by said Pike as his attorney in said actions at law was terminated by the death of said Pike as aforesaid, and the said Talbot was paid and received the taxable costs recovered in said actions at law after the death of said Pike, and it does not appear and it is not true in fact that any appeal citation was ever taken out by the said Talbot as an appellant from the disallowance by the circuit court of his petition or served upon either this appellant or Mary H. Pike or any other person or persons as appellees.

Seventeenth. And this appellant assigns as erroneous so much of the decree of the said circuit court of appeals as awards him his costs of suit in both courts as against Butterfield as plaintiff in the cross-bill of complaint, for the reason that the said cross-bill was never lawfully served on him, and that the said circuit court never acquired any jurisdiction of or under the same as against the said Gregory or any other person, the said Butterfield being then a citizen of California, and the said Gregory a citizen of Illinois; and also because the circuit court not having passed upon the question of costs and no costs being claimed or asked by said Gregory against said Butterfield, the circuit court of appeals had no authority to award the same to him of its own motion.

Eighteenth. And this appellant assigns as erroneous so much of the decree of the circuit court of appeals of January 31st, 1895, as adjudges "that Mary H. Pike, executrix, recover her costs against Gregory" in said court of appeals and in said circuit court, for the reason that if the said Mary H. Pike was ever duly made a party defendant to Gregory's bill of complaint of January 10th, 1887, that bill of complaint was finally dismissed as to her by order of the circuit court passed January 24th, 1891, without costs, and no costs were ever claimed or applied for by her or allowed to her in the said circuit court, and because the said circuit court of appeals, as an appellate court, in the absence of any action taken by the court below in the matter of costs or of any appeal from such action, has no jurisdiction whatever respecting the same.

F. A. BROOKS,
Solicitor for the Appellant.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

* * * * * * *

EXTRACTS FROM RECORD IN GREGORY *v.* TALBOT, NO. 603, OCTOBER TERM, 1895.

(Record, p. 6.)

Petition of Thomas H. Talbot.

And now comes Thomas H. Talbot, an attorney and counsellor of this court, and suggests and states to this court that the notes of hand made and signed by W. C. N. Swift and payable to Charles F. Jones, both of whom are known to the court as named in the record in this suit, bearing date April 20, 1883, one for $15,000 and interest and the other for $20,334.60 and interest, which are the matter in dispute in this cause, having been by the original defendant, Frederic A. Pike, placed in his hands as such attorney and counsellor for collection, he did as soon as or soon after said notes respectively became payable bring suits (Nos. 2435 and 2632) on the same on the law side of this court in the name of the payee, Charles F. Jones, aforesaid, and prosecuted those suits to judgment and obtained execution thereon against said Swift, and that upon those executions the debtor Swift paid into the registry of this court the following sums, to wit: Upon the execution upon judgment for the note for $15,000 the sum of $18,823.14, being for debt and interest, exclusive of taxable costs, and upon the execution upon judgment for the note for $20,334.60 the sum of $24,881.59, being for debt and interest, exclusive of taxable costs, making a total sum collected for debt and interest, exclusive of taxable costs, of $43,703.73, which sum was paid into and now remains in the registry of this court, and constitutes, with the interest since accumulated thereon, a fund in the control of this court.

And because said collection has been and now is for the benefit of any person or party who has been or hereafter may be found to be rightfully entitled to said fund or to any part thereof, said Talbot prays and moves this court, now that it is making a final disposition and distribution of said fund, to order to be paid therefrom to this petitioner a suitable compensation for professional services rendered and as counsel fees earned in said collection.

And he respectfully submits that an allowance at the rate of two and a half per cent. upon the whole sum, or an allowance of one thousand ninety-two dollars sixty-two cents, will be just and proper ($1,092.62).

THOMAS H. TALBOT.

(Record, p. 7.)

The foregoing petition came on to be heard by the court, the Hon. Le Baron B. Colt, circuit judge, sitting, on the fifth day of March, 1894, and was denied by the court as of Feb. 6, 1894, and the following rescript filed:

Rescript.

(Filed March 8, 1894.)

COLT, *J.:*

Motion of Thomas H. Talbot for allowance of counsel fees, to be paid out of the fund in this case, in two actions of law, No. 2435 and 2632, Jones *v.* Swift, is denied.

* * * * * * *

(Record, p. 7.)

The said Thomas H. Talbot thereupon, in open court, claims an appeal to the United States circuit court of appeals for the first circuit and gives good and sufficient security that he will prosecute his appeal to effect and answer all costs if he fail to make his plea good, and said appeal is allowed.

A true record.

ALEX. H. TROWBRIDGE, *Clerk.*

* * * * * * *

(Record, p. 11.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

THOMAS H. TALBOT, Appellant,
v.
MARY H. PIKE, Executrix, *et al.*, Appellees. } No. 100.

Before Putnam, Webb, and Carpenter, JJ.

Final Decree, January 31, 1895.

This cause came on to be heard October 25 and 26, 1894, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, with—

CHARLES A. GREGORY, Appellant,
v.
MARY H. PIKE, Appellee, } No. 98.

CHARLES A. GREGORY, Appellant,
v.
JOHN C. KEMP VAN EE, Appellee, } No. 99.

GEORGE W. BUTTERFIELD, Appellant,
v.
CHARLES A. GREGORY *et al.*, Appellees, } No. 101.

on separate appeals and was argued by counsel.

On consideration whereof it is now, to wit, January 31, 1895, ordered that Thomas H. Talbot, attorney for Mary H. Pike, executrix, recover the amount for services asked for in his intervening petition; that the amount so recovered rank as explained in the opinion filed

this day in this case; that the cross-bill of Kemp Van Ee stand as an intervening petition *pro interesse suo;* that Mary H. Pike, executrix, recover her costs against Gregory in this court and in the circuit court; that Gregory recover his several costs against Butterfield and Kemp Van Ee on their cross-bills both in this court and in the circuit court; that no other costs be recovered in either court except as expressly stated in the decree entered in the circuit court March eighth, eighteen hundred and ninety-four; that Mary H. Pike, executrix, and Kemp Van Ee be allowed respectively accumulations and interest to the time of the entry of the final decree on the rules applied to him or her in said decree entered said March eighth, and that the case be remanded to the circuit court with directions to enter a final decree conforming to this order, so far as it goes, and in all other respects to said decree entered March eighth, eighteen hundred and ninety-four.

By the court:

JOHN G. STETSON, *Clerk.*

* * * * * * *

(Record, p. 18.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

THOMAS H. TALBOT, Appellant,
v.
MARY H. PIKE, Executrix, *et al.*, Appellees. } No. 100.

Appeal.

And now comes Charles A. Gregory, one of the appellees in the above-entitled cause, and, conceiving himself aggrieved by the decree in favor of the said Talbot made and entered in said cause on the 31st day of January, 1895, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, and of all proceedings had in said cause since the entry of said decree, may be sent to the said Supreme Court of the United States.

By his solicitor, F. A. BROOKS.

April 2, 1895.—The foregoing appeal is allowed.

WILLIAM L. PUTNAM,
U. S. Circuit Judge and Judge of the United States Circuit Court of Appeals for the First Circuit and Presiding in the Above-named Cause.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

* * * * * * *

(Record, p. 20.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

THOMAS H. TALBOT
v.
MARY H. PIKE, Executrix, *et al.* } No. 100.

Assignment of Errors in the Circuit Court of Appeals.

And now, on the 29th day of March, A. D. 1895, comes Charles A. Gregory, one of the defendants or respondents in the above-entitled cause or proceeding, by F. A. Brooks, his solicitor, and says that the decree of the said circuit court of appeals entered in said cause on the 31st day of January last is erroneous and against the rights of him, the said Gregory, for the following reasons:

First. Because the said Thomas H. Talbot was not at any time a party to the original equity cause of Charles A. Gregory, complainant, against Frederic A. Pike and Wm. C. N. Swift, defendants, and was not entitled to take an appeal from the final decree of the circuit court made and entered in said cause on the 8th day of March, 1894, and was not mentioned or referred to in said final decree.

Second. Because it does not appear that the said Talbot became an intervening petitioner in the original equity cause of Gregory against Pike and Swift prior to the entry of the final decree of the circuit court in said cause (March 8th, 1894), and did not, in fact, file such petition until the 13th day of March, 1894, which was five days after the entry of the final decree of the circuit court in said original cause.

Third. Because the petition of the said Talbot, styled by him an intervening petition, having been filed in the circuit court on the 13th day of March, 1894, was overruled or denied by said circuit court as of February 1st, 1894, or as of a date a month and a half antecedent to the presentation of the said petition to the circuit court and the action of the said circuit court thereon.

Fourth. Because it does not appear of record and is not true in fact that any appeal citation was ever taken out by the said Talbot and served on the said Gregory, Mary H. Pike, and Kemp Van Ee, or either of them.

Fifth. Because the said Gregory, who had not, prior to the 21st day of March, 1895, entered any appearance in the aforesaid appeal cause of said Talbot or recognized the same as lawfully pending in said circuit court of appeals, did on that day appear before said circuit court of appeals and asked the leave or permission of said court to appear therein for the purpose of presenting a motion for the dismissal of said cause as one not properly pending before said court for its adjudication, and said circuit court refused to receive or entertain said motion or to allow it to be filed in said cause.

F. A. BROOKS,
Solicitor for the Appellant Gregory.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

* * * * * * *

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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY, APPELLANT,

v.

MARY H. PIKE.

Motion of Mary H. Pike to dismiss the Appeal.

And now comes Mary H. Pike, appellee in this cause, and moves to dismiss the above appeal of Charles A. Gregory with costs. And for the ground of this motion she respectfully says that it appears by the record that this cause was duly brought by said Gregory in the Supreme Judicial Court of Massachusetts, and was by said Gregory duly removed to the Circuit Court of the United States for the District of Massachusetts upon the ground of the diverse citizenship of the parties, and upon no other ground (pp. 7 and 8). And the jurisdiction of said Circuit Court depended entirely upon said diverse citizenship; and said cause was heard and determined in said Circuit Court, and upon due appeal to the Circuit Court of Appeals for the first Circuit, was by said last-named Court finally determined by its decree dated January 31, 1895 (p. 10), from which decree said Gregory has brought this appeal (p. 11). It appears by said record that no question or proposition of law has by said Court of Appeals been certified to this Court for instructions, whereupon she prays as above, and has caused to be printed all such parts of the record as bear upon the allowance or refusal of this motion.

By her Solicitors,

JOHN LOWELL,
THOMAS H. TALBOT.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY, APPELLANT,

v.

MARY H. PIKE, APPELLEE.

On motion to dismiss this appeal: Brief for the motion.

This case, originally brought in the Supreme Judicial Court of the State of Massachusetts, was on application of the plaintiff, removed thence to the Circuit Court for that district, on the ground of the diverse citizenship of the parties; the complainant Gregory being a citizen of the State of Illinois; the defendant Swift, a citizen of the State of Massachusetts; and the defendant Pike, a citizen of the State of Maine. The removal papers show this ground of jurisdiction in the Circuit Court, and they show no other ground (p. 7).

The record further shows a decree of said Circuit Court, in favor of the present appellee, "Mary H. Pike, executrix of the original defendant, Frederick A. Pike, since deceased"; the case before the Circuit Court of Appeals for the First Circuit on appeal of the original complainant Gregory; a decree of this latter Court, in favor of the same party, Mary H. Pike, and later an appeal from this last-mentioned decree by the appellant, Charles A. Gregory, to this Court, which last appeal the said Mary H. Pike, appellee, now seeks to have dismissed, on the following ground of law.

The jurisdiction of the Circuit Court in this case was dependent entirely upon the opposite parties to the suit being citizens of different States.

In such a case the decree of the Circuit Court of Appeals is final. Stat. 1891, c. 157, Sec. 6; 26 Stats. 828.

That Court may certify to this Court questions or propositions of law for instructions how to decide them (same section).

That no such certificate has been made in this case appears by the decree (p. 10) which decides the whole case, and remands it to the Circuit Court with directions to proceed in conformity thereto, etc.

JOHN LOWELL,
T. H. TALBOT,
Solicitors for Mary H. Pike.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 603.

CHARLES A. GREGORY, APPELLANT,
v.
THOMAS H. TALBOT, APPELLEE.

Motion of Appellee to dismiss Appeal.

And now comes Thomas H. Talbot, appellee in this cause, and moves the Court to dismiss the above appeal of Charles A. Gregory with costs.

And for grounds of said motion this appellee respectfully says that it appears that this cause was duly brought by said Gregory in the Supreme Judicial Court for Massachusetts, and was by said Gregory duly removed thence to the Circuit Court of the United States for the District of Massachusetts, upon the ground of the diverse citizenship of the parties, and upon no other ground (pp. 7 and 8) and the jurisdiction of said Circuit Court depended entirely upon the said diverse citizenship; and said cause was heard and determined in said Circuit Court, and upon due appeal to the Circuit Court of Appeals for the first Circuit, was by said last-named Court finally determined by its decree dated January 31, 1895, (p. 19) from which decree said Gregory has brought this appeal (p. 19).

It appears by said record that no question on proposition of law has by said Circuit Court of Appeals been certified to this Court for instructions.

Moreover the decree appealed from is one merely from the allowance of costs (pp. 17–19). Wherefore this appellee moves as above referring to the portions of the record in No. 602, which Mary H. Pike, appellee, has caused to be printed, for support in part of this motion, and for further such support to the portions of the record in this case (No. 603) which this appellee has caused to be printed.

THOMAS H. TALBOT, *Appellee.*

No. 603.

SAME APPELLANT
v.
THOMAS H. TALBOT.

Also on motion to dismiss Appeal: Brief for motion.

All that has been urged in support of the motion to dismiss in No. 602 is of force equally in this case, and the Court is respectfully referred to the foregoing Brief for that view.

In 603 there is also this further ground of dismissal.

No appeal can be taken from the Circuit Court of Appeals to this Court, unless the amount in controversy "exceeds one thousand dollars, besides costs" (Acts of March 3, 1891, supra). In this case there is no amount in controversy besides costs. It was costs and costs alone which was in controversy. And "no appeal lies from a mere decree respecting costs and expenses." Canter *v.* Ins. Co., 3 Peters 307 (318); Elastic Fab. Co. *v.* Smith, 100 U.S. 110 (112).

T. H. TALBOT, Appellee.

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY,

Appellant,

v.

MARY H. PIKE,

Appellee.

BRIEF FOR APPELLANT ON MOTION OF APPELLEE FOR DISMISSAL OF THE APPEAL.

F. A. BROOKS,

Of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY, *Appellant*,

v.

MARY H. PIKE, *Appellee*.

Brief for Appellant in Opposition to Motion by Appellee for Dismissal of the Appeal.

I.

The transcript of appeal record in the above-entitled cause has not been printed. The motion to dismiss the appeal is based upon "*Extracts from record in Gregory* v. *Pike*, *No.* 602."

These extracts occupy 16 pages out of the 20 pages which have been printed for the hearing of the motions of the appellees to dismiss in the two causes, Nos. 602 and 603, respectively.

The extracts from appeal record in No. 602 consist of the matter following, viz. : —

1. Bill of complaint in case of Charles A. Gregory, of Chicago, Ill., against Frederic A. Pike, of Calais, Me., and William C. N. Swift, of New Bedford, Mass., filed in the Supreme Judicial Court of Massachusetts, Dec. 16th, 1884. Rec., pp. 1–5.

2. Answer of Frederic A. Pike to said bill of complaint filed in Supreme Court of Massachusetts, Feb. 11th, 1885. Rec., pp. 5–7.

3. Petition of the plaintiff Gregory for the removal of said cause to the United States Circuit Court, filed in Supreme Court of Massachusetts, April 28th, 1885. Rec., pp. 7, 8.

4. Order of removal from the State Court of Massachusetts, May 5th, 1885.

5. Final decree in case of Charles A. Gregory *v.* Frederic A. Pike *et al.*, entered March 8th, 1894, in the Circuit Court.

Rec., pp. 8, 9.

6. Final decree of the United States Circuit Court of Appeals in the cause of Charles A. Gregory, Appellant, *v.* Mary H. Pike, Appellee (No. 98), entered in said Court Jan. 31st, 1895, being the same decree also entered at the same time in three other causes or appeals then pending in said Court of Appeals. entitled, respectively, Charles A. Gregory, Appellant, *v.* John C. Kemp Van Ee, Appellee, (No. 99), Thomas H. Talbot, Appellant, *v.* Mary H. Pike, Executrix, *et al.*, Appellees (No. 100), and George W. Butterfield, Appellant, *v.* Charles A. Gregory *et al.*, Appellees (No. 101). Rec., pp. 9, 10.

7. Appeal of Charles A. Gregory *v.* Mary H. Pike, Appellee, from the decree of the Circuit Court of Appeals, in appeal cause No. 98, to the Supreme Court of the United States.

Rec., pp. 10, 11.

8. Assignment of errors filed by Charles A. Gregory in the Circuit Court of Appeals March 28th, 1895, on taking his appeal from the decree of said Circuit Court of Appeals to the Supreme Court of the United States in cause No. 98, entitled Charles A. Gregory, Appellant, *v.* Mary H. Pike, Appellee. Rec., pp. 11–16.

The eight papers above mentioned constitute the whole record upon which the motion of the appellee, Mary H. Pike, to dismiss the appeal cause No. 98 in the Circuit Court of Appeals, entitled Charles A. Gregory, Appellant, *v.* Mary H. Pike, Appellee, is based and is now brought to a hearing by said appellee.

These extracts from the appeal record as made up and printed by the appellee for the hearing of her motion to dismiss, do not contain or purport to contain a transcript of any appeal ever taken by the plaintiff Gregory from the final decree of the Circuit Court of March 8th, 1894, in the cause of Charles A. Gregory against Frederic A. Pike *et al.*, to the United States Circuit Court of Appeals, though

such an appeal was taken and filed, and allowed by the judge of the Circuit Court, March 9th, 1894, as shown by the transcript of appeal record at p. 247 of said transcript, not brought before this Court by the appellee.

The extracts from the appeal record as furnished by the appellee for the hearing of her motion to dismiss, etc., do not contain or purport to contain a copy or transcript of the assignment of errors made and filed in the Circuit Court by Gregory, as appellant, from the decree of said Circuit Court in the cause entitled Charles A. Gregory *v.* Frederic A. Pike *et al.*, as set forth at pages 249 250 and 251 of the transcript of appeal record in this cause.

The extracts from the transcript of record furnished for the hearing of this motion to dismiss the appeal do not contain evidence of any service of the process of a subpoena ever made upon Frederic A. Pike in the suit of Gregory against him, or show how the said Pike was made a party defendant to said cause commenced Dec. 16th, 1884, in the State Court of Massachusetts, or subjected to the jurisdiction of the State Court, the plaintiff Gregory and the defendant Pike not being, at the time, citizens of or residing within said State of Massachusetts and therefore not subject to the jurisdiction of its Courts.

From the transcript of appeal record (p. 13, top) it appears that the subpoena issued out of the State Court upon the original bill of complaint contained the following indorsement, signed "T. H. Talbot, Solicitor for F. A. Pike within named."

SUFFOLK, ss.

"Dec. 16th, 1884, I admit due service of the within precept on me this day and waive further service thereof."

The extracts from transcript of record furnished the Court by the appellee on this motion do not show in terms the fact of the death of both Frederic A. Pike and W. C. N. Swift, the two original defendants, or of either of them, although it appears from the transcript of appeal record on file that the said Pike deceased on the 2d day of December, 1886, and that the said Swift deceased early in the

year, 1892, or about two years prior to the final decree of the Circuit Court entered in said cause, so that at the time of the entry of said final decree and for about two years prior thereto, neither of the two original defendants were living.

The extracts from the transcript of appeal record printed for use upon the hearing of the appellee's motion to dismiss do not contain or mention or refer in any way to the following paper filed by Charles A. Gregory in the Circuit Court in the cause of Charles A. Gregory *v.* Frederic A. Pike, and Wm. C. N. Swift, June 23d, 1892 (Appeal Rec., p. 224), and entitled in said cause, to wit: —

"And now comes Charles A. Gregory, the plaintiff, by whom said suit was brought, not admitting said cause to be pending in Court for any purpose, and appears for the purpose of taking the objection that no such cause is now pending or within the jurisdiction of this Court, and for the purpose of objecting and excepting to any action being taken by the Court in said cause by which he, the said Gregory, shall be bound, and he appears for this purpose only.

By F. A. BROOKS, *his Solicitor for this purpose only.*"

This disclaimer was filed by said Gregory after the decease of both the original defendants, Pike and Swift, and was intended by him to show to the Circuit Court, that he regarded the old cause as abated or ended by the decease of both the original defendants, and that said cause could no longer be kept on foot by the Court with his consent or permission.

Another important paper was filed by the appellant Gregory in the old cause of Gregory *v.* Pike and Swift, April 11th, 1893, or eleven months before the entry of the final decree of the Circuit Court in that old cause, which contained a disclaimer by said Gregory of any right on his part to further prosecute said old cause and a protest against any further action or proceeding being taken therein by the Court in his name or behalf.

The extracts from the transcript of record as furnished by the appellee do not contain this paper or refer to it in any way.

This paper is found at pages 225, 226 of the transcript of appeal record and is here copied into this brief as follows: —

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

CHARLES A. GREGORY, *Complainant*,

v.

FREDERIC A. PIKE AND WM. C. N. SWIFT, *Defendants*.

[FILED APRIL 11, 1893.]

And now comes Charles A. Gregory, complainant in the above-named cause, and gives the Court to be informed that Frederic A. Pike was the only defendant to his bill of complaint against whom relief was sought; that said Pike was a citizen of the State of Maine; that W. C. N. Swift was joined with said Pike as a nominal defendant only, against whom no cause of action was stated and no relief was sought by complainant; that the said Pike died at his home in Maine on the second day of December, 1886; that the said Swift died in the early part of the year 1892; that on the nineteenth day of October, 1889, this bill of complaint was, by order of Court, finally dismissed as to the said Swift, reserving for adjudication the question of costs to which the said Swift might be entitled; that since then no action has been taken or proceedings had in said cause as between the parties to said bill above named; that he, said Gregory, never had nor claimed under his said bill to have any rights or demands whatever against any person except the said Pike deceased; that the demand set up in his said bill of complaint against the said Pike was referred to arbitration during the lifetime of said Pike, and this cause was taken out of court for that purpose, leaving in court no claim whatever of this complainant against the estate or legal representatives of said Pike deceased; and that, if any such claim or demand existed and was embraced in said suit, it was enforceable in the courts of the State of Maine where the legal representatives of the said Pike reside and not in this court and that such demand or demands, if any there were, have long since become barred by the statute of limitations.

And this complainant disclaims any and all right whatever to prosecute his said bill of complaint, since the death of said Pike, against any one, and respectfully objects to any further action being had or taken by this Court upon or under his said bill of complaint, except upon the question of the right of the said Swift or his legal representatives to recover costs of suit prior to the time of his decease.

By F. A. BROOKS,
the solicitor of said Gregory, so far and so far only as said cause is still pending for adjudication.

If the errors assigned by Gregory to the final decree of the Circuit Court of March 8th, 1894, were before this Court upon this hearing of the motion of Mrs. Pike to dismiss Gregory's appeal, it would be perceived by this Court that the principal objection taken by Gregory to that decree of the Circuit Court was because Mary H. Pike had been and was recognized and treated by said Circuit Court in said decree as a party to the old equity cause of Gregory against Pike and Swift, long after the decease of both Pike and Swift, the original defendants, and because this was done in the absence of any legal proceedings whatever being taken for the purpose of introducing the said Mary H. as a party litigant in said old cause.

If this Court is willing to take the trouble of examining portions of the transcript of appeal record, deemed by us material to the motion to dismiss but not furnished to this Court by the appellee, we are entirely willing it should do so and that upon such examination it should pass finally at this time upon the motion to dismiss this appeal.

II.

We ask the leave of Court to suggest some reasons why this motion to dismiss the appeal should be denied, and not merely postponed until the case (No. 602) shall be reached in its order for hearing after the transcript of record shall have been printed in full.

The motion to dismiss the appeal is entitled in the cause of

Charles A. Gregory, Appellant, *v.* Mary H. Pike, and the appellee states the ground of her motion to be that it appears by the record (meaning the record as printed by the appellee for the purposes of this hearing) —

"that this cause was brought by said Gregory in the Supreme Judicial Court of Massachusetts, and was by said Gregory duly removed to the Circuit Court of the United States for the district of Massachusetts upon the ground of the diverse citizenship of the parties, and upon no other ground. And the jurisdiction of said Circuit Court depended entirely upon said diverse citizenship; and said cause was heard and determined in said Circuit Court, and upon due appeal to the Circuit Court of Appeals for the First Circuit was by said last-named Court finally determined by its decree dated Jan. 31st, 1895, from which decree said Gregory has brought this appeal."

The final decree of the Circuit Court as printed for this motion (Rec., p. 8) is entitled in the cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, in equity, No. 2170, meaning No. 2170 in the Circuit Court. It does not appear from the record printed that an appeal was taken from that decree of the Circuit Court by any one.

It does appear from the record (pp. 9, 10) that the cause of Charles A. Gregory, Appellant, *v.* Mary H. Pike, Appellee, being cause No. 98 in the Circuit Court of Appeals for the First Circuit, came on to be heard in that Court with three other causes entitled respectively Charles A. Gregory, Appellant, *v.* John C. Kemp Van Ee, Appellee (No. 99), Thomas H. Talbot, Appellant, *v.* Mary H. Pike, Executrix, *et al.*, Appellees (No. 100), and George W. Butterfield, Appellant, *v.* Charles A. Gregory *et al.*, Appellees (No. 101), on separate appeals and was argued by counsel, and that on the thirty-first day of January, 1895, a final decree was entered therein by said Circuit Court of Appeals, which decree concluded in these words, —

"And that the case be remanded to the Circuit Court with directions to enter a final decree conforming to this order so far as it goes, and in all other respects to said decree entered March 8th, 1894,"

meaning the decree of said Circuit Court of that date.

It does appear from the record (p. 10) that Gregory did appeal from this decree of January, 1895 to the Supreme Court in due form

of law as alleged in the motion to dismiss, and did make an assignment of the errors imputed by him to said Circuit Court of Appeals in making its said decree. Rec., pp. 11–16.

The motion of Mary H. Pike now before this Court is for the dismissal of this last-named appeal of Gregory from the decree of Jan. 31st, 1895, and it does not appear from the extracts of the appeal record, as printed for this hearing, that the decree of the Circuit Court of Appeals (January, 1895) was made in the same cause as the decree of the Circuit Court of March 8th, 1894 was made.

The decree of the Circuit Court (March 8th, 1894) is entitled in the cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, No. 2170. Rec., p. 8, bottom.

The decree of the Circuit Court of Appeals (Jan. 31st, 1895) is entitled in the cause of Charles A. Gregory, Appellant, *v.* Mary H. Pike, Appellee, No. 98.

There is nothing in the record, as printed for this hearing, to show the identity of these causes, or that Gregory ever appealed from the decree of the Circuit Court made and entered by that Court March 8, 1894.

There is nothing in the record as printed for this motion which shows that the Circuit Court ever had jurisdiction of any cause between Charles A. Gregory and Mary H. Pike or that any such cause was ever pending in said Circuit Court, or upon what grounds of jurisdiction such a cause, if pending in said court, was based or rested.

An examination of the bill of complaint, printed at pages 1–5 of the record, will show the plaintiff Gregory to have been a citizen of Illinois, the defendant Pike to have been a citizen of Maine and the defendant Swift to have been a citizen of Massachusetts; that Gregory had no cause of action against Swift and prayed for no relief as against him, so that he was a merely nominal party defendant; that Gregory's only cause of action against Pike was a claim made by him to the ownership of two certain notes signed by Swift and in the possession of Pike, as pledgee of the same from one George W. Butterfield.

Under the laws of Massachusetts (Chap. 164 of Public Statutes, Sect. 1) it was not possible for Gregory to implead Pike in the courts

of Massachusetts, without the consent of said Pike. As Gregory did not himself live in Massachusetts and could not have maintained an action in Massachusetts courts against Pike in Massachusetts courts, even if he had resided there, it was necessary that some defendant residing in Massachusetts should be found in order to give Gregory a standing in courts of Massachusetts, or to initiate a cause into which Pike might enter as a party and so become by his own consent a litigant with Gregory.

Swift was selected as a defendant for this purpose, and Pike agreed beforehand that if joined as a defendant in such a suit brought by Gregory, he would appear and submit himself voluntarily to the jurisdiction of the Massachusetts court, and he did so. The suit thus instituted, nominally against both Swift and Pike but really against Pike alone, though it could not have been originally brought or commenced in the United States Circuit Court for the Massachusetts District, was yet capable of removal to that court from the State Court and was so removed in May, 1885. Rec., pp. 7, 8.

It does not appear from the printed record that any persons but Gregory, Frederic A. Pike and Swift were parties to said old equity suit so begun in the Massachusetts State Court at any time.

The only light shed by the printed record upon this matter is found at pp. 8 and 9 of the record. It there appears that on March 8th, 1894, the Circuit Court entered a certain final decree in a cause entitled Charles A. Gregory *v.* Frederic A. Pike *et al.*, being equity cause No. 2170 in said Circuit Court.

By this decree (§ 5) it is provided, —

"That there be paid to Mary H. Pike, executrix of the original defendant, Frederic A. Pike, since deceased, the sum of twenty-five thousand dollars, with interest thereon, from Jan. 1st, 1884, if the fund remaining in the registry of the court shall be sufficient for the payment, and if not sufficient, the balance of said fund."

There is nothing in the original bill of complaint which appears to justify any such decree as this in favor of an alleged legal representative of the original defendant F. A. Pike, against whom the bill of complaint showed that Gregory claimed to recover for the possession of two certain notes, but not for the contents of said notes; and there is nothing in Gregory's bill of complaint which could by possibility

justify or support any decree in favor of Frederic A. Pike in his lifetime as against Gregory or any other person or fund or property, had the suit come to an end in favor of Pike during his lifetime, unless for the costs of suit.

It thus appears, as it seems to us, in the first place, that the jurisdiction acquired by the Circuit Court of the case of Gregory against Pike and Swift did not depend solely or entirely upon the opposite parties (Gregory and Pike), being citizens of different States, but depended, in part at least, upon the voluntary consent of Pike to be made a defendant to the suit as brought in the State Court of Massachusetts, without which consent that suit could neither have been brought in said State Court or removed therefrom, afterward, to the Circuit Court; and we venture to suggest that the clause relating to "jurisdiction," found in the 6th section of the act creating the Court of Appeals, (1891), refers to cases originally commenced in the Circuit and District Courts of the United States, and not to causes commenced in a State Court, and subsequently removed to said United States Courts. We are not aware that the District Courts possess any jurisdiction of causes *inter partes*, unless they are brought originally in such District Courts.

III.

There is nothing in the extracts from the transcript of appeal record, printed by the appellee for this hearing, to show or enable this Court to understand how it happened that Mary H. Pike, named as executrix in the decree of the Circuit Court of March 8th, 1894, came to be substituted as a party in the place and stead of Frederic A. Pike, the original defendant in the cause of Gregory against Pike and Swift, removed from the State Court to the Circuit Court in May, 1885. Rec., p. 7, 8.

If we are correct in our understanding of the views or intentions of the Circuit Court of Appeals, in allowing this appeal of Gregory as it did, it would seem that the appellee, Mary H. Pike, is mistaken in supposing that there was any connexion whatever between the legal grounds on which the original cause between other parties was removed from the State Court to the Circuit Court in 1885, and the

ground on which the Court of Appeals proceeded in allowing the appeal of Gregory to this court as against Mary H. Pike, between whom and Gregory no cause or suit had ever been pending in the State Court of Massachusetts or the Circuit Court, so far as appears from the record as printed.

IV.

The appellee in this case, for reasons of her own, has seen fit to present her motion to dismiss this appeal based wholly upon the representation that it was and is an appeal from the final decree entered March 8th, 1894, in the cause of Charles A. Gregory against Frederic A. Pike *et al.*, begun in the State Court of Massachusetts in December, 1884, and removed thence to the Circuit Court of the District of Massachusetts, by which latter Court the decree in question was made and entered. There is nothing in the record as printed by the appellee for the purposes of this hearing which shows that Mary H. Pike ever became a party litigant with Gregory in that old cause in her alleged capacity of executrix of the will of the original defendant, Frederic A. Pike, of Calais, Me., deceased.

There is nothing in the record of that old cause, as printed for this hearing, to show that Frederic A. Pike was not living at the date of the final decree (March 8th, 1894), unless the recital contained in the fifth paragraph of the final decree, describing Mary H. Pike as "executrix of the original defendant, *Frederic A. Pike, since deceased*," is to be taken as proof of the death of said Frederic A. and also as proof of the further fact, that Mary H. Pike had been appointed his executrix, and had been admitted as such executrix as a litigant with the plaintiff Gregory in this cause in the Circuit Court, prior to the time of said final decree.

The appellee seems to have supposed that this Court would either fail to perceive this defect of the record as furnished by her for this motion, or would not hesitate to supply the "missing link" of the chain by the inference that it must exist and should therefore be taken for granted as already existing.

The appellant strenuously objects to any such course as this being pursued, and for this reason asks leave to show, from portions of

the appeal record which the appellee has not printed, that the representation as to Mary H. Pike having become a party to the old equity cause of Gregory *v.* Pike, deceased, in her alleged capacity of executrix of his will, is without the slightest foundation in fact, and therefore is not to be assumed or taken for granted by this Court at this hearing of the motion to dismiss the appeal of the plaintiff in that old cause.

We will endeavor to support our position in this respect by placing before this court portions of the transcript of record not furnished by the appellee, even though this devolves upon us the necessity of proving a negative, or of disproving what seems to have been assumed as a fact by the appellee in her motion to dismiss, and the brief of the counsel in support of that motion.

The transcript of record in the cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, at pages 137 and 138, contains the following paper filed June 21, 1887, and entitled

PETITION OF MARY H. PIKE, *Executrix.*

The petition of Mary H. Pike, executrix of the above named Frederic A. Pike, she having been summoned in by said Gregory and having appeared and filed her answer, as such executrix, respectfully represents, —

That John G. Stetson, a defendant in this case, holds a certain promissory note signed by the defendant W. C. N. Swift for fifteen thousand dollars, dated April 20th, 1883. That said note is one of the two notes as to which the said suit is brought to establish the title thereto. That judgment *is about to be entered in a case at law* pending in this court, No. 2435, Jones *v.* Swift, brought to recover the amount of said note, and said Swift *is about to pay* said amount into court.

Now your petitioner says that said Stetson was intrusted with said notes by F. A. Brooks, as attorney for said plaintiff Gregory, and Thomas H. Talbot, *as attorney for your petitioner.*

That said Stetson having been made a party to this bill for the very purpose of requiring him to deal with said note as your honors may order; *and this Court has full power over said Stetson in the premises.*

She thereupon prays that said Stetson be ordered *to file said note in said action at law* in order that said judgment may be properly entered in said action.

And further that if said Swift shall pay the amount of the said judgment into the registry of this Court, that the same may be held subject to the rights of all parties claiming said note and to abide the decisions of the Court in this cause.

MARY H. PIKE,
by J. LOWELL, *Attorney.*

The transcript of record in said cause of Gregory and Pike deceased, at pages 138 and 139, also contains the following paper filed July 9th, 1887, entitled

ORDER OF COURT.

NELSON, J. Upon the petition of Mary H. Pike, executrix, filed in this cause, and with the consent of Swift and Butterfield, defendants in this cause, and of Thomas H. Talbot, attorney for Charles F. Jones in the suit at law of Jones *v.* Swift, No. 2435, on the law docket of this court, it is ordered: —

(1.) That defendant Stetson file the note of $15,000, referred to in the said petition, in the said action at law, No. 2435, of Jones *v.* Swift.

(2.) That upon the entry of judgment in the said action of law, said Swift be directed to pay into the registry of this court the amount of said judgment (but without commissions, by consent of the parties named herein), and that said amount be held subject to the rights of the parties claiming said note, and to abide the decision of the Court in this cause.

(3.) That upon the payment by said Swift into the registry of this court of the amount of said judgment, an order of satisfaction of said judgment be entered of record.

By the Court,
ALEX. H. TROWBRIDGE, *Deputy Clerk.*

It will be perçeived by reference to the first sentence of the petition of Mary H. Pike of June 21st, 1887, that she assumed to be executrix of Frederic A. Pike; and recites that she had "been sum-

moned in by said Gregory" and had "appeared and filed her answer *as such executrix*," meaning, as we suppose, her answer as alleged defendant in the old equity cause of Gregory *v.* Frederic A. Pike, of Calais, Me., deceased.

The transcript of appeal record contains no evidence except this, that Mary H. Pike as executrix of the will of F. A. Pike, of Calais, Me., deceased, was ever made or ever became a party to the old equity cause of Gregory and Pike, No. 2170.

If this recital by Mary H. Pike, herself, in this paper filed in the old cause, June 21st, 1887, does not amount to proof of that recital, and is not to be regarded by this Court as conclusive upon that point; then we need present no reasons to this Court to show it should have no such operation or effect.

Suppose, however, it were true (as will probably be claimed by the appellee at the hearing of this cause upon the full appeal record, if that time ever comes) that, by reason of her petition filed in the old cause, June 21st, 1887, and the order of Court thereon made (July 9th, 1887), as aforesaid, she did then become a party to said old equity cause (No. 2170), and did thereby become entitled as such party and as executrix of the will of F. A. Pike, deceased, to be paid the sum of $25,000 with interest thereon from and after Jan. 1st, 1884, or for more than three years before it appears that she became such executrix, and for a period of two years before the decease of Frederic A. Pike, the alleged testator, still it does not appear from the petition of June 21st, 1887, and the interlocutory order or decree of July 9th, 1887, based thereon, how the $15,000 Swift note, therein mentioned, (if paid into court by Swift as contemplated in the closing paragraph of the order of July 9th, 1887) could yield so large a sum as $25,000, and interest thereon after Jan. 1st, 1884, as set forth in the order, and we submit with entire confidence that said final decree of the Circuit Court (of March 8th, 1894) could not and did not operate to give Mary H. Pike any standing whatever as a party litigant in the old cause of Gregory and Pike (No. 2170). That old cause, as we submit, was brought to an end by that decree (March 8th, 1894), without

any change of parties therein, so far at least as appears from the extracts of record printed by the appellee for this hearing.

It follows, therefore, as we respectfully submit, that the decree of March 8th, 1894, so far as regards Mary H. Pike, could do no more than to introduce her into the cause at that date (March 8th, 1894) for the first time as a petitioner who had been permitted by the Court to intervene and become a claimant of the fund, said to be in possession of the Court for administration or distribution by it according to law.

By adopting this interpretation of the meaning and intention of the decree of May 8th, 1894 (so far as it relates to Mary H. Pike), it becomes intelligible, and perhaps consistent with legal rules and precedents, as it would not be, if understood as recognizing and treating said Mary H. Pike as a full party defendant to Gregory's old cause commenced in the Massachusetts State Court in 1884, and abated or terminated (as we say) as between Gregory and Frederic A. Pike by the decease of said Pike, Dec. 2d, 1886, or more than eighteen months prior to the presentation (June 21st, 1887) by Mary H. Pike, executrix, of her petition in relation to the $15,000 Swift note of April 20th, 1883, described in said petition as hereinabove copied into this brief.

V.

From what is above written it seems to us to appear that Mary H. Pike (the appellee) never stood in any relation whatever to the old equity cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, prior to June 21st, 1887, when, perhaps, she may have become an *intervening petitioner* therein, under and by virtue of the petition then filed by her in said cause, and the order of Court thereon made and entered July 9th, 1887, as aforesaid.

If we are correct in this view, it necessarily follows that the jurisdiction of the Circuit Court as between Mary H. Pike and Gregory never depended in the slightest degree upon their being citizens of different States (neither of them having been a citizen of Massachusetts), but that such jurisdiction, if it existed at all, depended entirely upon the recognition by the Circuit Court of Mary H. Pike as *an in-*

tervening petitioner in said old cause (2170) under and by virtue of her petition of June 21st, 1887, as hereinabove set forth.

Upon this view of the *status* of Mary H. Pike in this appeal, it is obvious that the decree of the Circuit Court of Appeals on Jan. 31st, 1895, was not final under Section 6 of the Appellate Court's Act, as contended by her, and that her motion to dismiss the appeal should be denied.

F. A. BROOKS, *Solicitor for Appellant.*

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY,

Appellant,

v.

MARY H. PIKE,

Appellee.

PETITION OF APPELLANT FOR REHEARING OF APPELLEE'S DISMISSAL MOTION.

E. J. PHELPS,
F. A. BROOKS,

Of Counsel for the Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 602.

CHARLES A. GREGORY, *Appellant*,

v.

MARY H. PIKE, *Appellee*.

Petition of Appellant for Rehearing of the Motion for Dismissal.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, Charles A. Gregory, the appellant in the above entitled cause, respectfully represents unto your Honors that the defendant Mary H. Pike, in November last, presented her motion to this Court that said cause be dismissed; and as the ground of said motion alleged that said appeal cause was the same which was originally brought by your petitioner in the Supreme Judicial Court of Massachusetts and was thence duly removed to the Circuit Court of the United States for the District of Massachusetts; that the jurisdiction of the said Circuit Court in said cause "depended entirely upon the diverse citizenship of the parties"; that said cause was heard and determined in said Circuit Court, and, upon due appeal to the Circuit Court of Appeals for the First Circuit, was there finally determined by its decree dated Jan. 31st, 1895, from which decree this appeal was taken by your petitioner to this Court; that the said decree of said Circuit Court of Appeals was final, and that said appeal to this Court should for that reason be dismissed; and that such representation of the said Mary H. Pike was accepted by this Court as true, and your petitioner's appeal was dismissed on the 25th ultimo.

Your petitioner further represents that if it were true that the

decree of the Circuit Court of Appeals, so appealed from by your petitioner, was made in the cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, commenced in the State Court of Massachusetts in 1884, then said appeal was rightfully dismissed by your Honors.

But your petitioner avers that it is not true that the appeal of your petitioner from the decree of the Circuit Court of Appeals to this Court, or his appeal from the decree of the Circuit Court to the Circuit Court of Appeals, was taken in the old cause of Gregory *v.* Pike *et al.*, as alleged by the appellee in her motion to dismiss this appeal.

On the contrary your petitioner avers that his said appeal to this Court as well as his previous appeal from the decree of the Circuit Court was taken from the decision or decree made in the cause of Chas. A. Gregory *v.* William C. N. Swift *et al.*, commenced by bill of complaint filed and entered in the Circuit Court on the 10th day of January, 1887, and having no existence as a cause in Court at any time before that day; and that this fact would have been apparent to this Court had the Court been put in possession by the appellee of the transcript of record placed on the files of this Court by the appellant.

Your petitioner admits that it was ruled and held by the Circuit Court that the cause brought by your petitioner against Swift, Stetson and Talbot, and entered in said Circuit Court, Jan. 10th, 1887, as aforesaid, was not a new cause, or entitled to be treated as such, but was merely a continuation of the old cause originally brought by your petitioner in the State Court, as aforesaid, and that consequently, when Mary H. Pike was made a party defendant to the bill of complaint of Jan. 10th, 1887, in April, 1887, she was thereby also made a party defendant to the old bill of complaint, brought in the State Court as aforesaid.

And your petitioner shows that this refusal of the Circuit Court to recognize your petitioner's suit of Jan. 10th 1887 as a new cause, distinct and separate from the old cause brought in 1884 against other parties defendant, all of whom had deceased long before the final decree of March, 1894, was the principal error assigned by your petitioner as appellant from the decree of the Circuit Court to the Circuit Court of Appeals.

The record printed by the appellee for this hearing does not even show the existence of this second suit brought by your petitioner against Swift, Stetson and Talbot in the Circuit Court by bill of complaint there filed Jan. 10th, 1887, and your petitioner is led to infer that the existence of this second suit was neither known to nor taken into consideration by your Honors, when you granted the appellee's motion for a dismissal of this appeal.

Had the contents of this second bill of complaint been brought to the knowledge of your Honors at that time, you would have seen that it related to only one of the two Swift notes described in the original bill of complaint of 1884, and that this one note was no longer in possession of Frederic A. Pike, deceased, or his representatives, but in possession of John G. Stetson, the only defendant to said second bill of complaint against whom any relief was sought in and by said second bill of complaint.

Believing that the appellee in stating in her motion to dismiss this appeal, that said appeal was taken in the old cause brought by your petitioner in the State court of Massachusetts, has erred and misrepresented the facts and thus has misled your Honors, your petitioner respectfully requests that he may be allowed to point out to your Honors, if he can, the mistake into which your Honors have, as he conceives, been led by the appellee, and if he succeeds in this, that your Honors will vacate the order dismissing his appeal entered Nov. 25th, 1895, and order the appeal to be restored to the docket for hearing upon the full transcript of record when reached in its order. And your petitioner in making this request calls your Honor's attention to the fact that a similar motion has been filed for a dismissal of the appeal taken by your petitioner from the decree made by the Circuit Court of Appeals Jan. 31st, 1895, in the cause of J. C. Kemp Van Ee against your petitioner, being cause No. 99 on the docket of said Court of Appeals, and cause No. 601 on the docket of this Court, and that these two appeals were taken by your petitioner from the same decree of the Court of Appeals, and involve very similar questions; and your petitioner ventures to suggest that this petition for rehearing will be better understood if your Honors, in considering the same, will refer to the brief of your peti-

tioner's counsel in opposition to the motion of Kemp Van Ee for dismissal in the appeal cause No. 601.

In order to show that your petitioner's appeal in cause No. 98 in the Circuit Court of Appeals was not taken by him in the original cause removed to the Circuit Court from the State Court, as alleged in the motion of the appellee, Mary H. Pike, your petitioner will endeavor to show, affirmatively, that his said appeal was taken in another and a different cause, to wit, in the cause entitled Charles A. Gregory *v.* William C. N. Swift *et al.*, being the cause brought by your petitioner as complainant in the bill of complaint filed in the Circuit Court by him Jan. 10, 1887, and printed in full at page 77 of the transcript of record, but not printed by the appellee.

The only parties defendant to said bill of Jan. 10, 1887, when it was filed, were William C. N. Swift, John G. Stetson and Thomas H. Talbot, all citizens of Massachusetts, and the bill was dismissed as to these defendants very soon after it was brought, and thus ended as to them. But on the 22d day of April, 1887, your petitioner procured leave of the Circuit Court to amend that bill of complaint by inserting at the end of said bill the words and figures following, to wit: —

"And your orator further complaining shows that soon after the 10th day of January, 1887 . . . the money which had been previously paid into the registry of this court in the action at law of Jones *v.* Swift, No. 2632, to be applied in satisfaction of the said note of Swift of $20,334.60, was transferred from said action at law to this cause . . . by the consent of the parties making claim to said fund, and upon the understanding that this Court would, in this cause, determine to which of the two claimants, viz., this complainant or Mary H. Pike, executrix, the said fund lawfully belonged;

. . . . . .

and this complainant hereby makes the said Charles F. Jones and Mary H. Pike defendants to this amended bill of complaint; and inasmuch as the said note was drawn payable to the said Jones and was not in terms negotiable, and the said Jones resides in Philadelphia, and the said Mary H. Pike, executrix, . . . resides in Calais, in the State of Maine, so that both of them are beyond the jurisdiction of this Honorable Court, and subpœnas, if issued, could not be served on them, your complainant prays for an order of this Honorable Court to be served on them personally, requiring them and each of them to appear and plead, answer or demur to this amended bill

of complaint on or before the 15th day of May next, in pursuance of the provisions of the Act of Congress, approved March 3, 1875."

Full Transcript of Rec., p. 93.

On the 21st day of June, 1887, Mary H. Pike placed on file in the Circuit Court a paper entitled,

"Answer of Mary H. Pike, widow of said defendant Frederic A. Pike, and executrix of his last will and testament, to the supplemental bill of the complainant Gregory, filed Jan. 10, 1887, and to the amendment thereof filed April 22, 1887, and also to the complainant's original bill of complaint and all amendments thereof filed before said April 22, 1887." Transcript of Rec., p. 94.

Mary H. Pike claimed by these proceedings, and by the filing of her said answer in her alleged capacity of defendant to both the bills of complaint of your petitioner, to have been made a defendant to your petitioner's bill of complaint of December, 1884, brought in the State Court of Massachusetts, and that the second bill of complaint was not the commencement of a new suit, but the continuation of the old suit as against her as executrix of the will of her husband, Frederic A. Pike, deceased, and the Circuit Court sustained her in this position.

On the 10th day of November, 1888, Mary H. Pike filed the following paper in the Circuit Court entitled in the cause of Charles A. Gregory *v.* Frederic A. Pike *et al.* viz. —

"And now comes the defendant, Mary H. Pike, executrix, and moves the Court to dismiss the bill of the complainant Gregory because he has filed no replication to the answer of this defendant filed June 21 1887."

Full Transcript of Rec., p. 101.

The above motion was heard by the Circuit Court Nov. 10, 1888, and on Nov. 20, 1888, the Court passed an order thereon in the words following:

"Colt J. — Leave given to complainant to file replication to answer of Mary H. Pike, executrix, on or before the 30th instant; if replication is not then filed, bill to be dismissed as against said Mary H. Pike, executrix, as provided by Equity Rule 66."

Full Transcript of Rec., p. 102.

On the 23d day of November, 1888, your petitioner, as complainant in the cause entitled "Charles A. Gregory by supplemental bill filed in court Jan. 10, 1887, *v.* William C. N. Swift *et al.*," filed in the Circuit Court a paper styled —

"The Replication of the complainant in the supplemental bill filed by him Jan. 10th, 1887, as amended April 22, 1887, so as to join Mary H. Pike as a party defendant, to so much of the answer of the said Mary H. Pike, filed June 21, 1887, as relates to said supplemental bill and the amendment thereof."

At the end of the replication so filed by your petitioner were the words following, viz. : —

"The said Gregory not intending hereby to waive his motion to strike out that portion of the answer of the said Mary H. Pike which purports to be an answer to the original bill of Gregory *v.* Frederic Pike *et al.*, and which attempts to incorporate the record in said original cause with her answer to this bill."

Full Transcript of Rec., p. 102.

The foregoing extracts from the full appeal record in this cause show how Mary H. Pike came to be a party litigant with him in the Circuit Court, if she ever was such a "party litigant" with him in the full sense of that term, in any cause pending in said Circuit Court; and, as your petitioner respectfully submits, they negative the allegation contained in the appellee's motion to dismiss that she ever was a party litigant with him in the old cause brought by him in the State court in December, 1884, and thence removed to the Circuit Court, and show that his present appeal (No. 602) was not taken from any decree ever made in that old cause. Your petitioner further submits and asks your Honors to find and hold, that the amendment of his second bill of complaint made April 22, 1887, as aforesaid, under the provisions of Section 8 of the Judiciary Act of March 3, 1875, did not operate to make Mrs. Pike a defendant to that bill in the ordinary and legal sense of that term, and that she never was made a full party defendant to said bill, in any way, by the plaintiff, or with his consent.

The statute under which the notice was issued to her to appear, plead or answer in said cause has received a judicial construction on several occasions, and its scope and meaning are no longer doubtful.

The late Mr. Justice Curtis, of the United States Supreme Court, gave an early construction to the statute (originally passed by Congress June 1, 1872) in a course of lectures delivered by him at the Harvard University Law School, and published after his death. He said: —

"The substance of that" (meaning what is now § 738, Rev. Stat. U. S.), "is, where real or personal property is within the territorial jurisdiction of the Court, and a third person claims some right, either to the property itself, or to a lien on it, or some interest in it, he may have that title adjudicated upon by the Circuit Court within whose territorial jurisdiction the property is, by means of a notice given to the person in the manner here provided, although that person is not even within the district, and cannot be served with what can be called a process of court; because such a notice as is here provided for *is not a process of the Court*, but is merely a means of giving him notice that he may appear if he wishes to. This is an important extension of the authority of the Court, especially in those States where questions constantly arise in regard to real property; it is more important there than in the Eastern States, where questions of title to real property are comparatively of infrequent occurrence."

This same statute came under judicial construction in the case of Woolridge *v.* McKenna, reported in 8 Fed. Rep. 650, where it is referred to as the 8th section of the Act of March 3, 1875. The Court (Hammond, J.) in his opinion in that case (page 673, middle) said: —

"That section, as I understand it, applies only to suits *commenced* in any Circuit Court of the United States and does not apply to removed cases," and therefore not to the old cause of Gregory and Pike, deceased, which was commenced in the State Court, and thence removed to the Circuit Court.

In the case of Shainwald *v.* Lewis (5 Fed. Rep., page 517), the Court referring to this same statute as Sect. 738, U. S. Rev. Stats. said: —

"In my judgment this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal. . . . By the words 'legal or equitable lien or claim against real or personal property' Congress intended to reach every case in which there should be any sort of charge upon a *specific*

piece of property capable of being enforced by a court of equity. . . . In case the absent defendant does not appear it is only the property . . . which is to be affected."

In the case of Non-Magnetic Watch Co. *v.* Association (44 Fed. Rep. 6) the Court, referring to this statute, said: —

"The various cases which were cited by the complainant's counsel interpreting this section are concerned either with real property or with such tangible personal property as was susceptible to reduction to actual possession. I cannot satisfy myself that the section covers, or was intended to cover, such incorporeal or intangible property as a patent right, possession of which must of necessity be ideal, not actual, and which cannot be seized and sold under an execution."

The case of Kilgore *v.* N. O. Gas Light Co. (2 Woods, 144), is to the same effect.

From these cases we infer that this statute (Sect. 8 of the Act of March 3d, 1875) does not refer to, or embrace and include in its meaning, such property or rights of property as these two Swift notes in question, or either of them, or as the judgment recovered in the action at law of Jones *v.* Swift, in the Court below, on the 16th day of December, 1886, paid and satisfied by the judgment debtor and so entered of record in said court on the 6th day of January, 1887, four days prior to the commencement by Gregory, of a second bill of complaint, termed "supplemental bill," in the old cause of Gregory *v.* Pike, and, consequently, that the amendment of said second or supplemental bill, made April 22d, 1887, did not operate to introduce Mary H. Pike as a party defendant either to said new cause of Jan. 10th, 1887, or to the orginal cause of Gregory *v.* Pike, brought Dec. 16th, 1884.

From the opinion of this Court in Greely *v.* Lowe (decided Oct. 29, 1894) it would seem that the notice to Mary H. Pike to appear and answer Gregory's amended bill issued in pursuance of the 8th section of the Act of March 3, 1875, conferred on her at most no greater right than that of resisting the claims set up by Gregory, the plaintiff in said bill of complaint, and that if she desired to present any claim of her own to the property in question, or to litigate offensively in said suit with Gregory, she could only do so

by instituting proceedings for that purpose in her own behalf, as she never did.

The Circuit Court refused to recognize your petitioner's bill of complaint of Jan. 10th, 1887, as the institution of a new cause or suit, but uniformly held and ruled that it was merely a proceeding in the original cause brought in the State Court of Massachusetts in 1884, or supplemental thereto, and that in that way it operated to introduce Mary H. Pike as a party defendant to the old cause of 1884, as aforesaid. Your petitioner, on the other hand, contended that in and by his bill of complaint of Jan. 10th, 1887, he had instituted and inaugurated a suit quite distinct and separate from the old cause against Pike, so far as Pike was concerned, and supplemental to that old cause, if at all, so far only as Swift was concerned; and your petitioner made this one of the grounds of the appeal taken by him both from the decree of the Circuit Court and from the decree of the Circuit Court of Appeals.

See Appellee's Record for Motion, page 11.

The record printed by the appellee for this motion, shows your petitioner's assignments of errors in this case, to have been entitled in the cause of Charles A. Gregory, appellant, from decree of the Circuit Court, against Mary H. Pike, and her alone. The second error assigned by him was in these words: —

"Because the said Mary H. Pike was not entitled to litigate (meaning actively) with said Gregory in said original cause, and never presented any claims to the Circuit Court as a litigant with Gregory in said original cause, or any petition for leave to litigate with Gregory in said original cause, and never set up any claim in her own name and behalf as a party to said original cause, or as one entitled to litigate therein for any purpose, and never produced or offered to produce any evidence in support of any right or relief claimed by her as a party litigant in said original cause."

In its opinion of Jan. 31, 1895, the Circuit Court of Appeals, referring to this ground of error assigned by your petitioner, observed;

"The objections made on behalf of Gregory that the bill filed by him Jan. 10, 1887 . . . and the original bill were held to be one

cause and were retained as against Mary H. Pike involve matters as to which he can make no complaint. He made her a party . . . and he expressly described the bill filed Jan. 10, 1887, *as in the nature* of a *supplemental bill*. . . . Gregory cannot take any advantage of errors of his own creating, if there were any in these matters."

From this last quotation it seems that the Circuit Court of Appeals, instead of passing upon the error assigned in the Circuit Court to the effect that the old cause was not pending at the time of the decree made in favor of Mary H. Pike by said Circuit Court, ruled and held or decided that your petitioner had, by the proceedings taken by him as his second cause under § 738 of Rev. Stats., become estopped to question the ruling made by the Circuit Court in that respect. Furthermore your petitioner invites your Honor's attention to the fact that the appellee's record does not even show that the Circuit Court had made the ruling objected to by us or any ruling whatever in regard to Mary H. Pike not being a party to the old cause, nor show that any appeal had been taken or claimed by your petitioner from any such ruling or decision of said Circuit Court, so that your petitioner will lose the benefit of the appeal, taken in the Circuit Court, if your Honors refuse to revise the action taken upon the same matter or question by the Circuit Court of Appeals.

The same subject or point was again called to the attention of the Circuit Court of Appeals in the application made by your petitioner to that Court for a rehearing by it of said appeal, and that Court, in its opinion denying such petition (March 21st, 1895), used this language, —

"In the petition for a rehearing filed by appellant Gregory as against Pike, it is insisted that the Court has overlooked the point made by Gregory touching the alleged abatement of his original bill. This was rendered unimportant by what was held in our opinion with reference to his bill filed Jan. 10th, 1887.

. . . . . .

"If the decree in favor of Mary H. Pike was personal against any individual, and not limited to the fund, the error would be so palpable that this Court might be obliged to consider it even under very inartificial assignments. But the decree does not take on that character."

It seems to your petitioner that these quotations from the two opinions of the Circuit Court of Appeals go to show that that Court sustained the jurisdiction of the Circuit Court in making its final decree, challenged by your petitioner, upon the ground that such jurisdiction had been gained or acquired under your petitioner's bill of complaint of Jan. 10th, 1887, as amended in April, 1887, to embrace the appellee Mary H. Pike as a party to the same and that such jurisdiction did not depend at all upon the contents of your petitioner's original bill of complaint brought in the State Court of Massachusetts as stated or alleged by the appellee in her motion to dismiss this appeal.

If your petitioner is correct in this last position, it would seem that the order of this Court dismissing his appeal should be vacated, or suspended or stayed till the cause shall be reached for hearing in its order upon the docket.

If your petitioner has not already gone far enough to satisfy your Honors that justice to him requires an opening of the motion to dismiss, he desires to invite your attention to another deficiency in the record furnished by the appellee for the hearing of her motion of dismissal.

The transcript of record on file in this cause shows that your petitioner's bill of complaint of Jan. 10th, 1887, as amended to include Mary H. Pike was duly dismissed as to her by an order of the Circuit Court made and entered in that cause on the 24th day of January, 1891. Transcript of Rec., pp. 104–5.

This dismissal as to Mary H. Pike of the only bill of complaint brought by your petitioner, into which she was ever notified to come and appear as a party litigant in any way or for any purpose, was made the subject of an assignment of error committed by the Circuit Court of Appeals in its decree of Jan. 31st, 1895. This error was assigned in these words, as shown by the record furnished by the appellee, page 13 : —

"And because if the said Mary H. Pike was duly made a defendant to Gregory's bill of complaint of Jan. 10th, 1887 (as is not admitted), yet the said bill of complaint was finally dismissed as

to her on the 24th day of January, 1891, by an order of the Circuit Court passed on that day."

To summarize the situation in this case, the record furnished by the appellee does not sustain the allegation of the motion that the decree of the Circuit Court of Appeals, here appealed from, was made in the old cause of Gregory against Pike and Swift; this record does not even show that any other suit but that ever was pending in the Circuit Court as between Mary H. Pike, the appellee, and your petitioner.

Your petitioner admits, however, that he did bring another suit in January, 1887, in the Circuit Court, against Swift, Stetson and Talbot; that Mary H. Pike was afterward notified to appear and demur, plead or answer to said suit, although your petitioner did not in that suit make any claim whatever against her; that she did so appear and did file her answer, but did not, in and by her said answer, make or assert any claim or demand whatever against your petitioner or against any fund or specific property; that at the time of bringing this second suit there was no fund or specific property of any kind in possession of the Circuit Court as a Court of Equity, or undergoing administration in said Circuit Court, although the Circuit Court, in its final decree of March 8, 1894, held otherwise; that the Circuit Court of Appeals, in its decree of Jan. 31, 1895, ruled and determined, as set forth in its opinion, that if the decree of the Circuit Court, in favor of Mary H. Pike, were treated as made in a cause *inter partes* or *in personam*, it could not be upheld, but that your petitioner was estopped by his own acts to take any such objection to that decree, and that, consequently, the decree of the Circuit Court should be affirmed, and was in fact affirmed by the Court of Appeals by its decree of Jan. 31, 1895.

It thus appears, as your petitioner submits, that the decree of the Circuit Court of Appeals, here appealed from, was not made in the old cause of Gregory *v.* Pike and Swift, as alleged by the appellee in her motion, but was made in another and totally distinct cause brought by your petitioner in January, 1887; and that said Court of Appeals, in making its decree of Jan. 31, 1895, took special pains to declare in its opinion, that it was not made in any cause

inter partes, and thereby contradicted in effect the appellee's allegation in her motion that it was made, in the old cause in equity No. 2170, which cause was one *inter partes*, and certainly continued to be such during the lifetime of the original defendants.

For the Petitioner,

E. J. PHELPS.
F. A. BROOKS.

We hereby certify that the foregoing petition is, in our judgment, well founded in matters both of law and fact, and that it should be granted.

E. J. PHELPS,
F. A. BROOKS,
of Counsel for the Petitioner.